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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1055

RUSSELL TRAIN, Administrator,
ENVIRONMENTAL PROTECTION AGENCY,
Petitioner,

WASHINGTON AREA BICYCLIST ASSOCIATION, INC., METROPOLITAN WASHINGTON COALITION FOR CLEAN AIR, INC., BREATHERS FOR THE REDUCTION OF ATMOSPHERIC HAZARDS TO THE ENVIRONMENT,
Petitioners-Intervenors

v.

DISTRICT OF COLUMBIA, ET AL.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF FOR PETITIONERS-INTERVENORS

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REPLY BRIEF FOR PETITIONERS-INTERVENORS

ARGUMENT

I. EPA's Basis for Regulation is Ownership of Highways by States, and Not Their Failure to Regulate Private Parties.

The States of Arizona, California and Maryland, the Commonwealth of Virginia and the District of Columbia

(hereafter "the States") ask this Court to hold invalid regulations of the United States Environmental Protection Agency (EPA) which require the States to take certain actions to reduce air pollution resulting from the use of motor vehicles on highways owned and operated by the States. However, the States concede that Congress intended, in the Clean Air Act, that State-owned sources of pollution be regulated in the same manner as private sources of pollution [1] and the States do not question the constitutionality of this decision by Congress. Thus, the basic issues in this litigation are whether EPA's determination that a highway is a source of air pollution is a reasonable interpretation of the Clean Air Act and whether the Act, so interpreted, offends the Constitution.[2]

[1] Brief for the States at 34, 38 n.61.

[2] The City of New York has submitted an *amicus curiae* brief in this case which suggests that a case now pending in the Second Circuit involving the City of New York bears a relationship to the instant case. The suggestion is wrong.

In the Second Circuit case, citizen plaintiffs sued, pursuant to § 304 of the Clean Air Act, to enforce a transportation control plan adopted by the State, approved by the Administrator, and ratified by the court. *Friends of the Earth* v. *EPA*, 499 F.2d 1118 (2d Cir. 1974). The Second Circuit has upheld plaintiffs' claim. *Friends of the Earth* v. *Carey*, 535 F.2d 165 (2d Cir. 1976). On remand from the 1976 decision, the District Court suggested that there may be constitutional infirmities to enforcement as ordered by the Second Circuit, and, to avoid such constitutional issues, in effect reversed the Second Circuit's interpretation of the Clean Air Act. *Friends of the Earth* v. *Carey*, —— F. Supp. ——, 9 E.R.C. 1007 (S.D.N.Y. 1976). Plaintiffs thereupon, in August 1976, petitioned for a writ of mandamus and moved for summary reversal. The Second Circuit by order in September, 1976, took the matter under advisement, received briefs from all parties, and is now considering its decision.

The City's *amicus* brief submitted in this Court is virtually identical to its main brief in the matter now pending in the Second Circuit. That explains why the *amicus* brief is, for the most part, unresponsive to the issues in this case. (The Natural Resources Defense Council is a plaintiff in the Second Circuit case and could, on request, provide copies of its briefs responding to the City's brief.) The cases are wholly dissimilar. First, in the Second Circuit case, EPA merely approved the State's own plan pursuant

The States avoid a direct argument that it is not reasonable to regard a highway as a source of air pollution. Rather, the States simply assert that EPA's conclusion is "an empty fiction." [3] Inspired by the strength of this assertion the States replace EPA's stated basis for regulation with a principle of their own formulation: "the failure of the States to enact and enforce laws and regulations to reduce air pollution from privately owned motor vehicles is the 'pollution creating activity' subject to federal regulation." [4] Then the States proceed to attack their own formula rather than EPA's stated rationale. This joust with a straw man does not aid the Court in resolving this case.

The facts belie the States' claim that EPA's rationale is a fiction. The statement that a highway is a source of pollution is no *post hoc* invention of counsel. It was a conclusion reached by EPA during its rulemaking process

to Section 110(a) and did not promulgate *any* regulations under Section 110(c) requiring the State to act. Second, in the cases before this Court, States, not political subdivisions, are challenging EPA's authority. In the Second Circuit case the State of New York has not only refused to challenge the constitutionality of the plan or its enforcement (its own plan, in any event), it has further stated that it will follow the provisions of the Clean Air Act by complying with its existing plan under court order or a revised plan. The City, however, disagrees with the State of New York's position and the State's plan. Thus, the Second Circuit case raises issues fundamentally different from the instant case.

The City's brief also misleads the Court in asserting that implementation of the plan would be a drain on the City's treasury. (City Br. at 2, 3). The City has never supported this claim with facts nor can it do so because many of the plan's strategies are self-supporting and others actually generate revenues. For example, the strategy to toll those bridges entering Manhattan which are still untolled was designed to raise net revenues close to $200 million annually. For another example, the strategy requiring enforcement of traffic regulations also is a revenue raiser through ticketing of illegally parked cars.

[3] Brief for the States at 57.

[4] *Ibid.* See also, *Id.* at 16, 38.

and explicitly stated when the regulations in question were promulgated (38 *Fed. Reg.* 30632-30633, November 6, 1973).[5] As noted in the Intervenors' opening brief in this case, a number of States themselves, including the Commonwealth of Virginia, recognize that a highway is a source of air pollution.[6]

In addition, EPA's actions demonstrate that the Agency has not lighted upon the States' ownership of highways as a device to force the States to regulate private polluters. If, as the States assert, EPA's real intent in promulgating implementation plan regulations were to "commandeer the police power of the States"[7] whenever a State failed to regulate a private source of pollution, one would expect to find duties imposed on the States in EPA regulations covering sources of pollution other than highways. However, in all such instances EPA's regulations apply to the source owner and do not require action by the State. For example, see EPA's regulations applicable to gasoline stations and dry cleaning plants in Maryland [40 CFR 52.1087, 52.1088; (A. 665-668)].[8] Only when the State owns the source of pollution, as in the case of highways, have EPA's regulations required action by the State. Thus, EPA's position that the highway is a source of pollution is no fiction and it deserves a fair consideration on the merits.[9]

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[5] See Brief for the Federal Parties at 23 (A. 435) for the text of this statement.

[6] Brief for Petitioners-Intervenors at 7-8 n. 5.

[7] Brief for the States at 28.

[8] See also EPA regulations applicable to smelting operations in various States; e.g., Idaho: 40 CFR 52.676.

[9] In the opinions below in this litigation only the D.C. Circuit dealt on the merits with EPA's determination that a highway is a source of pollution and that court agreed with EPA's determination. *District of Columbia* v. *Train*, 521 F.2d 971, 989 (D.C. Cir. 1975).

EPA's basis for regulation is not a theory that "knows no rational bounds" nor a theory that would permit the federal government to require State regulation of private stationary sources of pollution.[10] EPA argues only that sources *owned* by the State may be required to be controlled by the State. State-owned highways are one such source. Private stationary sources are not such sources and, in fact, as just noted, when private stationary sources require control EPA has regulated them and has not required State action.

II. EPA's Conclusion That a Highway is a Source of Pollution is Reasonable.

The State's position is, in essence, that the federal government is powerless to hold the States responsible in any way for air pollution resulting from the use of highways owned by the States. However, the States cite no decision of this Court nor any other authority supporting the proposition that it is unreasonable to regard a highway as a source of air pollution or to hold the owner of a highway responsible for the pollution resulting from its use.[11]

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[10] Brief for the States at 44.

[11] The States' arguments concerning congressional intent under the Clean Air Act are reducible to the claim that Congress could not have intended that States be held responsible for highway pollution because there are no explicit statements in the legislative history accompanying the 1970 Amendments that EPA may take enforcement actions against State officials. This claim is without merit. Congress explicitly provided EPA with authority to promulgate regulations reducing pollution from sources in States with inadequate plans. Section 110(c). By its terms Section 113 authorizes enforcement actions against the owners of sources which fail to comply with such regulations. The States do not cite any provision of the Act nor any item of legislative history which suggests that it is unreasonable to regard highways as sources of pollution. There is, however, ample legislative history explicitly recognizing the need to regulate highway use in order to attain ambient air quality standards. See Brief for the Federal Parties at 32-33 n.26. Moreover, in highway legislation enacted the same

A highway is a piece of property. A tenet of black letter law is that when an owner of property invites third persons to engage in certain activities on his property he may be held responsible for the harmful effects of such activities.[12] EPA's conclusion that a highway owner may be held responsible for the pollution of those using the highway simply recognizes this principle. In their opening briefs EPA and the Intervenors cited a number of decisions by this Court and other courts which upheld this principle.[13] The State's contention that these authorities are distinguishable because the extent of the Commerce Power was not in issue, is misplaced. EPA and the Intervenors rely on these authorities to support the proposition that governmental entities which own properties used by third persons may be held responsible for damages resulting from the use. These authorities clearly support this principle and thus confirm the reasonableness of holding the highway owner responsible for reducing pollution resulting from highway use.

In commenting on *Griggs* v. *Allegheny County*, 369 U.S. 84 (1962),[14] the States ignore the fact that that

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day as the Clean Air Amendments of 1970, Congress explicitly recognized that highway operation could conflict with the mandates of the Clean Air Act and it directed the Secretary of Transportation to promulgate regulations to insure that highways constructed with federal aid would be consistent with air quality implementation plans under the Clean Air Act. 23 U.S.C. § 109(j). Finally, Congress did act after EPA promulgated its regulations herein to remove EPA's authority to impose *some* transportation controls, to wit, surcharges on parking. However, as EPA's Brief points out, Congress deliberately refrained from repealing EPA's authority for its regulations requiring actions by the States as owners of highways. See Brief for the Federal Parties at 33-36.

[12] See, e.g., 65 C.J.S. Negligence § 92 at p. 1044.

[13] Brief for the Federal Parties at 25-26. Brief for Petitioners-Intervenors at 7-10.

[14] Brief for the States at 43.

case held a governmental entity responsible for the noise pollution caused by third parties' use of a government-owned transportation facility. Under the rule of *Griggs* persons living near a highway would be able to hold the highway owner responsible for injury caused by noise and air pollution resulting from use of the highway.

Similarly, the States misrepresent the import of *Illinois* v. *City of Milwaukee*, 406 U.S. 91 (1972).[15] In declining to accept that case on the merits under its original jurisdiction, this Court of necessity found that a cause of action was available in federal district court against a governmental body which discharged the sewage pollution of the public to the detriment of a neighboring State. Contrary to the States' assertion, this Court did not "treat only the narrow federal jurisdictional issue."[16] The opinion in *City of Milwaukee* also discusses at some length federal common law as the rule of decision for cases which are brought. Significantly, at the close of its opinion this Court explicitly rejected the contention that a State or municipality might assert sovereign immunity to avoid responsibility for its discharge of the public's sewage: "While the kind of equitable relief to be accorded lies in the discretion of the chancellor [citation omitted], a State that causes a public nuisance is suable in this Court . . .". 406 U.S. at 108 n.10.

In *City of Milwaukee* this Court referred to the line of cases beginning with *Missouri* v. *Illinois*, 180 U.S. 208 (1901), which established the rule that a government may be held responsible for the sewage pollution resulting from the use of government facilities by members of the public. In a subsequent case involving sewage discharges by the State of New Jersey, this Court confirmed

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[15] *Id.* at 43-44.

[16] *Id.* at 43.

the power of the federal government to require New Jersey to treat its sewage prior to discharge. *New York* v. *New Jersey*, 256 U.S. 296 (1921). In this case the federal government intervened on its own behalf in an original suit brought by New York against New Jersey. A stipulation obligating the State of New Jersey, through an authorized agency, to treat its sewage was entered into by the United States and the New Jersey agency. It was argued that the stipulation was invalid for want of power on the part of the United States. This Court held that under the "large powers of the Government over navigation and commerce" as well as under its property power, the federal government had the power to sue the State of New Jersey and to settle that suit by a stipulation requiring New Jersey to reduce its sewage pollution. 256 U.S. at 308.

There is no distinction between the water pollution discharges from State sewers and the air pollution discharges from State highways. In each case the State constructs a facility which has the effect of collecting, along an artificial artery, pollutants generated by individual members of the public. In each case it is the concentration of many sources of pollution within a public facility which creates a pollution problem of greater severity. This latter point applies with particular strength to highways. A highway, unlike a sewer, is not simply a channel for pollution which would have occurred anyway. A highway and the system of highways are the necessary preconditions to the very existence of our present motor vehicle pollution problems. The provision of highways by the States has made it possible for the number of vehicles and the frequency of their use to grow to a point where the total volume of pollutants generated has become a hazard to public health.

Thus, we believe that the decisions of this Court in *Griggs* v. *Allegheny County*, *supra*, and in the line of

sewage discharge cases beginning with *Missouri* v. *Illinois*, *supra*, clearly support the propriety under the Clean Air Act and under the Constitution of EPA's position that a highway is a source of pollution and that the owner of the highway may be held responsible for reducing the pollution resulting from its use.

If, on the contrary, this Court were to hold that considerations of State sovereignty prevented the federal government from imposing duties on the States on this basis, then the vitality of *Missouri* v. *Illinois*, *supra*, and subsequent cases would be put in serious question. If the federal government is prevented by State sovereignty from holding a State responsible for the polluting effects of State facilities, then how could one State overcome the same claim of sovereignty in an original suit in this Court against an adjacent polluting State?

To hold that the federal government may not require a State to reduce pollution from its highways would surely mean that one State could not seek relief in this Court against an adjacent State to protect its citizens from injury due to pollution generated on the highways of that adjacent State. Yet this Court has frequently recognized that among the sovereign rights which remained with each State after it joined the union was the right to protect its air and water from unreasonable pollution by the acts of persons beyond its control, whether such persons be private parties, *Georgia* v. *Tennessee Copper Co.*, 206 U.S. 230, 237-238 (1907), or sister States. *Missouri* v. *Illinois*, *supra*, 180 U.S. at 241; *North Dakota* v. *Minnesota*, 263 U.S. 365, 373-374 (1923).

This case involves claims of competing rights of a sovereign nature just as it would if it were a suit between two States where one State was seeking to require a sister State to reduce pollution generated by its highways. If this Court concludes that the rights claimed by

the States in this case are superior to those claimed by the federal government then the right of each State to generate air pollution will be elevated to a position superior to that of the right of any State (or the union of States) to be free from harmful levels of air pollution. We believe this result would be an inappropriate interpretation of a Constitution whose purpose is, in part, to "promote the general Welfare."

III. The Public's Use of the States' Highways Does Not Eliminate the Responsibility of the States as Owners of the Highways.

The States argue that EPA can regulate automobile drivers directly and thus it is unnecessary and improper to regulate the States as the owners of the highway facilities which the drivers use. However, to accept this principle would immunize a great many actions by States from regulation by Congress under the Commerce Power. The States' apparent position is that where, in any State facility, acts by members of the public contribute to the burden on commerce, that Congress may proceed only against the individuals and cannot impose duties on the State as the owner of the facility. Thus, a State could presumably own and operate a public race course for automobiles, motorcycles, snowmobiles, etc., and if federal air or noise pollution limits were exceeded the federal government's only remedy would be to regulate the individual users of the course. Similarly, States could locate airports in areas where flights would interfere with flight patterns supervised by the federal government with complete State immunity from federal regulation. A decision by a State to purchase land and invite its citizens to use that land to burn their refuse would apparently not be subject to regulation by the federal government.[17] One can think of many other examples of

[17] As a corollary to this line of reasoning a sister State which objected to such a trash-burning "park" located just within the borders of an adjacent State presumably could not seek relief against the adjacent State in this Court because of the availability of the remedy of suits against each of the individual trash-burners.

facilities on whose owner, whether a State or a private party, the government ought to be able to impose duties but could not under the State's line of argument: for example, bars serving alcoholic beverages; gambling establishments; parks for mobile homes (and their attendant sewage); hunting and target-shooting areas. We believe the States would reject any claims by a private proprietor of any of these facilities that it was unreasonable for a State to regulate him because the State could regulate his patrons instead. The argument possess no greater vitality simply because the State is the owner.

In addition, the States' argument in this vein is objectionable because of their very direct role as builders and owners of highways in determining how many vehicles are able to operate simultaneously within their borders. If the federal government were to regulate each vehicle directly the magnitude of its task and the resources it must devote to that task would be determined principally by the number of vehicles it would be required to regulate. As the owners of highways the States are free to undertake projects which can significantly increase the number of vehicles operating in given areas. For example, many States, including Virginia and the District of Columbia, make some or all lanes of major arterial highways in metropolitan areas one-way during "rush hours" in order to permit more commuter automobiles to enter and leave the city each day. Over longer periods of time States permit and encourage increases in the number of motor vehicles by building major new highways. Thus, the State governments by these actions can cause increases in traffic and thereby significantly increase the administrative burden and cost of regulating that traffic. It is inappropriate for the States to insist

that EPA should be assigned the burden of regulating motor vehicle traffic while at the same time insisting on their rights to increase that traffic by building new highways or devoting additional lanes of existing highways to commuter automobiles. The States, as the level of government which makes highway construction and operation decisions which may increase traffic, are properly assigned the responsibility to manage that traffic to reduce pollution.

Regulatory agencies routinely must regulate pollution sources where actions by large numbers of individuals contribute to the total pollution generated. However, the agencies are not limited to regulation of the individuals; rather they may impose responsibility on the source owner. For example, an integrated steel mill may contain thousands of workers individually or collectively operating a variety of polluting processes. The institution which owns the mill, however, is not exempt from regulation. A highway system fit for intensive use by motor vehicles is a sophisticated technological development which would not exist in the absence of a coordinating institution responsible for its construction and management.[18] If a private body were the highway owner and operator there is no doubt that regulatory agencies would properly impose pollution abatement duties on that body. Instead, the States have established themselves as the institutional owners of highways. However, this choice by the States to fill the essential role of highway owner and manager should not cause the federal government to lose its authority to impose duties on the owner of the source. As Intervenors have shown in their opening brief [19] the States have chosen to engage

[18] Prior to State construction and management of highways, the road "networks" were acknowledged to be of poor quality and not systematically laid out. See the brief history set forth in Brief for Petitioners-Intervenors at 19-25.

[19] Brief for Petitioners-Intervenors at 21-25.

in the activity of owning highways and they may choose to withdraw from this activity if they wish. See *Steward Machine Co.* v. *Davis*, 301 U.S. 548 (1937). However, while they remain the highway owners the States may not properly insist that the federal government's power to reduce air pollution from highways is confined to regulation of individual vehicles.

IV. EPA's Regulations Do Not Require States to Enact Laws and Adopt Regulations.

The States argue that EPA is directly coercing the States into passing legislation and adopting regulations. However, EPA has conceded that its regulations cannot require performance of such actions.[20] Accordingly, the States contention that EPA at one time took a different position is not relevant. The federal government's concession has eliminated any controversy which may have existed.

However, the States argue that they must legislate and adopt regulations simply to implement EPA's regulations. To the extent this assertion is correct, it does not render EPA's regulations unconstitutional. First, under the Clean Air Act and the Supremacy Clause, promulgation of substantive regulations by EPA under Section 110(c) of the Clean Air Act provides the States with legal authority to enforce those regulations against individuals.[21] Second, while in some instances appropriations legislation may be necessary to provide specific State agencies with the authority under State law to expend funds for particular programs, similar appropriations legislation might be equally necessary to permit a State

[20] See EPA Pet. No. 75-909 at 17 n.15 and Brief for the Federal Parties at 20 n.14, 54.

[21] See *Natural Resources Defense Council* v. *EPA*, 478 F.2d 875, 888 (1st Cir., 1973), Accord, *District of Columbia* v. *Train*, 521 F.2d 971, 984. (D.C. Cir. 1975).

agency to purchase pollution control equipment for a State incinerator or to purchase safety couplers for State railroad cars.[22] Such legislation is auxiliary or incidental to the discharge by the State of its duties to reduce its pollution.[23] If the duties are properly imposed they do not become constitutionally infirm because they require an assignment of State funds to particular agencies, which under State law may only be accomplished by a legislative act.

V. Recognizing the Responsibility of States for Highway Air Pollution is Necessary to Protect Individual Rights.

The States argue that EPA, not the States, should be required to carry out programs to reduce highway air pollution. They do not contend that they cannot reduce highway air pollution nor that EPA can reduce highway air pollution more effectively or more rapidly than the States could. Rather it is the States' position that they have the right to do nothing to reduce highway air pollution and that they intend to insist on this right regardless of the impacts on the health of their citizens. We do not believe that the States, as owners of the highways, have the right to do nothing.

When important human rights are in need of protection this Court has held States responsible for the harmful actions of private persons using State facilities and has refused to accept the argument that the State has

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[22] The States have conceded that EPA may impose the former duties and this Court in *National League of Cities* v. *Usery*, 96 S.Ct. 2465 (1976) explicitly reaffirmed the latter duty, first announced in *United States* v. *California*, 297 U.S. 175 (1936).

[23] *District of Columbia* v. *Train, supra*, n.21, 521 F.2d at 987. This Court recognized that a State agency might have to adopt regulations applicable to a private tenant of a State parking garage in order to discharge a State duty to provide equal protection of the laws. *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 720, 725 (1961).

no duty to act affirmatively to prevent such harmful action. *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 725 (1961). Like the individual rights protected in *Burton*, the right to a life free from suffering caused by air pollution is an important right. A person suffering from emphysema or lung cancer experiences a diminished life. We do not argue that the States have a constitutional obligation to prevent such a diminution of life by air pollution. Rather, we argue that the right to health is important enough that it outweighs on balance State claims of sovereign rights to do nothing in the face of threats to health caused by air pollution from highways which the States own and operate.

CONCLUSION

For the foregoing reasons, the judgments of the Court of Appeals for the Ninth and Fourth Circuits should be reversed and the judgment of the Court of Appeals for the District of Columbia Circuit should be reversed insofar as it prohibits EPA from requiring a State to implement necessary transportation control measures, and affirmed in all other respects.

Respectfully submitted,

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